

Feb 08, 2018

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MENSONIDES DAIRY, LLC, a
Washington State limited liability
company,

Plaintiff,

v.

AGRI-KING NUTRITION, INC., an
Illinois State corporation, and AGRI-
KING, INC., an Illinois State corporation,
Defendants.

No. 1:16-cv-03067-SAB

**ORDER DENYING
RECONSIDERATION**

Before the Court are the parties' Motions for Reconsideration, ECF Nos. 123 and 124. The motions were heard without oral argument.

On December 27, 2017, the Court granted in part and denied in part Defendants' motion for partial summary judgment. ECF No. 119. The Court granted summary judgment and dismissed Plaintiff's common law negligence and Washington Product Liability Act ("WPLA"), Wash. Rev. Code § 7.72.010, *et seq.*, claims. However, the Court denied summary judgment as to Plaintiff's breach of warranty claim.

The parties request the Court reconsider its decision and to reach a conclusion opposite that which it reached in its December 27, 2017 Order. Defendants' request the Court dismiss Plaintiff's breach of warranty claim, and

1 Plaintiff requests the Court reinstate its common law negligence and WPLA
2 claims. For the reasons set forth below, the Court **denies** the parties' motions.

3 **STANDARD**

4 Motions for reconsideration are generally disfavored and are considered "an
5 extraordinary remedy, to be used sparingly in the interests of finality and
6 conservation of judicial resources." *Kona Enters., Inc. v. Estate of Bishop*, 229
7 F.3d 877, 890 (9th Cir. 2000). A motion for reconsideration may be granted when:
8 (1) there is an intervening change in controlling law; (2) the moving party presents
9 newly discovered or previously unavailable evidence; or (3) the motion is
10 necessary to correct manifest errors of law or fact upon which the judgment is
11 based. *Turner v. Burlington N. Santa Fe R. Co.*, 338 F.3d 1058, 1063 (9th Cir.
12 2003).

13 Motions for reconsideration are not to re-hash arguments the court has
14 already thought through, or present arguments or evidence for the first time which
15 could reasonably have been raised earlier in the litigation. *See Kona Enters., Inc.*,
16 229 F.3d at 890. "Whether or not to grant reconsideration is committed to the
17 sound discretion of the court." *Navajo Nation v. Confederated Tribes and Bands of*
18 *the Yakama Indian Nation*, 331 F.3d 1041, 1046 (9th Cir. 2003).

19 **DISCUSSION**

20 **Defendants' Motion for Reconsideration**

21 Defendants argue the Court committed manifest error by declining to grant
22 summary judgment on Plaintiff's breach of warranty claim. The Court declined to
23 grant summary judgment because Defendants did not challenge Plaintiff's breach
24 of warranty claim appropriately.

25 Defendants' motion for partial summary judgment initially requested the
26 Court dismiss Plaintiff's claim for consequential damages for its breach of
27 warranty claims. ECF No. 96, at 19. In other words, Defendants were not seeking
28 dismissal of Plaintiff's breach of warranty claim; rather, Defendants sought to limit

1 Plaintiff's damages on proximate causation grounds. *Id.* at 20:15-19 ("Absent a
2 showing there is no evidence that the alleged breach of warranty . . . was a
3 proximate cause of any of Plaintiff's consequential damages and Plaintiff is left to
4 recover the 'usual, standard, and reasonable method if ascertaining damages in the
5 case of breach of warranty[.]"). Thus, had the Court granted Defendants' motion, it
6 would have done nothing more than limit the amount of damages Plaintiff sought
7 to recover.

8 In its response to Defendants' motion, Plaintiff clarified its breach of
9 warranty claim was not based on a theory that Silo-King contained less Colony
10 Forming Units ("CFU") than advertised on the product label. Defendants then
11 attempted to transform this motion for partial summary judgment, into summary
12 dismissal of Plaintiff's entire Complaint. ECF No. 113, at 2.

13 Defendants chose to challenge Plaintiff's claim for consequential damages
14 under a mistaken belief that Plaintiff's entire breach of warranty claim rested on a
15 label guarantee theory. Fortunately for Defendants, the deadline to file a
16 dispositive motion has been amended pursuant to the parties' joint motion. *See*
17 ECF No. 122. Thus, the parties are free to file any dispositive motion no later than
18 August 8, 2018. *Id.*

19 Nonetheless, the Court recognizes Defendants were convinced Plaintiff's
20 breach of warranty claim rested on a theory that Silo-King contained less CFUs
21 than advertised on the product label. Plaintiff has ensured that is not the case. And
22 if the Court's previous Order did not make it clear before, it makes clear now that
23 Plaintiff is foreclosed from raising a breach of warranty claim based on allegations
24 that Silo-King contained less CFUs than advertised on the product label. To allow
25 Plaintiff to raise this claim in the future would mean parties could avoid summary
26 judgment simply by playing a game of 'hide-the-ball.'

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1 **Plaintiff's Motion for Reconsideration**

2 Plaintiff argues “[i]t was clearly a mistake for the Court to summarily
3 dismiss plaintiff’s WPLA claim.” ECF No. 124, at 3. The Court construes this as
4 Plaintiff requesting reconsideration on the basis of manifest error. The Court did
5 not commit manifest error and denies Plaintiff’s motion because Plaintiff makes an
6 argument that could reasonably have been raised earlier in litigation. *See Kona*
7 *Enters., Inc.*, 229 F.3d at 890

8 The Court granted summary judgment and dismissed Plaintiff’s WPLA
9 claim because there was no genuine dispute of material fact that Plaintiff’s claim
10 fell under the statute’s “economic loss” exclusion. Wash. Rev. Code § 7.72.010(4).
11 As indicated in the Court’s Order, Plaintiff failed to meet its burden of pointing to
12 specific facts establishing a genuine dispute of material fact because, until now,
13 Plaintiff’s position was that the “economic loss” exclusion did not exist. *See, e.g.*,
14 Plaintiff’s Response to Defendants’ Motion for Partial Summary Judgment, ECF
15 No. 106, at 14:5-10 (“The problem with defendants’ argument and their reliance on
16 *Staton Hills Winery* (and other cases utilizing the economic loss rule) is that the
17 Washington Supreme Court has transformed the ‘economic loss’ rule and it no
18 longer exists/applies.”). And at the motion hearing, Plaintiff reiterated its position
19 that Washington no longer had an economic loss rule.

20 As illustrated in the Court’s Order, the WPLA’s “economic loss” exclusion
21 exists and applies to product liability claims that result in nothing more than pure
22 economic loss. *Touchet Valley Grain Growers, Inc. v. Opp & Seibold Gen. Const.,*
23 *Inc.*, 119 Wash.2d 334, 351 (1992). Plaintiff had two opportunities to create a
24 genuine dispute of material fact that the WPLA’s “economic loss” exclusion did
25 not apply, and Plaintiff failed to do so.

26 Plaintiff now files a motion for reconsideration and makes an argument
27 pursuant to the “sudden and dangerous test,” and the “evaluative approach.” This is
28 the first time Plaintiff has acknowledged the applicability of these two tests. The

1 Court denies Plaintiff's motion for reconsideration because Plaintiff makes an
2 argument that could reasonably have been raised earlier in litigation. *See Kona*
3 *Enters., Inc.*, 229 F.3d at 890.

4 **CONCLUSION**

5 For the reasons set forth above, the Court denies the parties' motions for
6 reconsideration.

7 Accordingly, **IT IS HEREBY ORDERED:**

8 1. Defendants' Motion for Partial Reconsideration of Order Granting in Part
9 and Denying in Part Defendants' Motion for Summary Judgment, ECF No. 123, is
10 **DENIED.**

11 2. Plaintiff's Motion for Reconsideration of Order Granting in Part and
12 Denying in Part Defendants' Motion for Partial Summary Judgment, ECF No. 124,
13 is **DENIED.**

14 **IT IS SO ORDERED.** The District Court Executive is hereby directed to
15 file this Order and provide copies to counsel.

16 **DATED** this 8th day of February 2018.



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A handwritten signature in blue ink, reading "Stanley A. Bastian", is written over a horizontal line.

23 Stanley A. Bastian
24 United States District Judge
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